STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2014
v	No. 314050 Barry Circuit Court
MICHAEL AARON TERPENING, Defendant-Appellant.	LC No. 11-000200-FC

Before: MARKEY, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b); one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b); three counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b); one count of attempted CSC IV, MCL 750.520e(1)(a); and two counts of aggravated indecent exposure, MCL 750.335a(2)(b). Defendant was sentenced to 10 to 15 years for CSC II and 10 to 15 years for CSC III, to be served concurrently, and 66 days for each of the other convictions, with 66 days credit for each. We affirm.

I. FACTS

Defendant ran two facilities on his farm in Barry County—an animal rescue called Earth Services, which involved young adult workers on probation who were completing community service as part of the KREP program, and a residential group home for teenage foster children called the House Next Door. Defendant was charged with 13 offenses[1] against three minors and two young adults that he met through his work with these two facilities. BH (17 years old), BD (17 years old), and RR (14 years old) were minor foster children placed with defendant at the House Next Door facility, and CW (21 years old) and TK (19 or 20 years old) were young adult probationers in the KREP program performing community service at Earth Services. Defendant was charged with the following offenses: (1) regarding BH—CSC III (force or coercion), two counts CSC IV (force or coercion), two counts aggravated indecent exposure, and attempted CSC III (force or coercion); (2) regarding BD—CSC II (age 13 to 15 and coercion/authority) or

[1] Counts 12 and 13 were alternative charges.

alternatively CSC II (employee of juvenile detention facility); (3) regarding RR—CSC III (force or coercion), CSC IV (force or coercion), and aggravated indecent exposure; (4) regarding CW—CSC IV (force or coercion); (5) regarding TK—attempted CSC IV (force or coercion). In a trial by jury, defendant was found guilty of all but the attempted CSC III charge involving minor BH; guilty of the single charges involving minor BD, young adult TK, and young adult CW; and not guilty of the three charges involving minor RR.

Pursuant to the sentencing guidelines range, defendant's sentencing range was 51 to 85 months. MCL 777.16y; MCL 777.63. However, the trial court determined at sentencing that there were substantial and compelling reasons to upwardly depart from the sentencing guidelines range, and sentenced defendant to concurrent sentences of a minimum of 10 to a maximum of 15 years' imprisonment for his CSC II and CSC III convictions. Defendant appeals as of right his convictions and sentences.

II. ANALYSIS

A. OTHER ACTS EVIDENCE

Defendant argues that the trial court abused its discretion by permitting other-acts testimony involving inappropriate sexual acts or propositions that unfairly prejudiced defendant and denied him a fair trial. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Buie (On Remand)*, 298 Mich App 50, 71; 825 NW2d 361 (2012). However, preliminary questions of law related to admission of evidence, such as whether admission is precluded by a rule of evidence, are reviewed de novo. *Id.* Ordinarily, close evidentiary questions cannot constitute an abuse of discretion. *People v Mardlin*, 487 Mich 609, 627 n 55; 790 NW2d 607 (2010).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

A trial court must determine the following when evaluating admissibility of other-acts evidence: "(1) whether the evidence is offered for a proper purpose under MRE 404(b), (2) whether the evidence is relevant under MRE 401 and 402, and (3) whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403." *People v Roscoe*, __ Mich App __; __ NW2d __ (Docket No. 311851, issued January 14, 2014), slip op at 5. Pursuant to MRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," and pursuant to MRE 402, relevant evidence not otherwise excluded by constitution or court rule is admissible. However, MRE 403 provides,

in part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

"[T]he touchstone of admissibility of evidence under MRE 404(b), as with all other evidence, is logical relevance[,]" and "[t]o establish logical relevance under this theory of admissibility, the other acts and defendant's claim of fabrication must be sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v King*, 297 Mich App 465, 476-477; 824 NW2d 258 (2012) (quotation marks and citation omitted). To establish this sufficient similarity there must exist "a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id.* (quotation marks and citation omitted).

Conversely, MCL 768.27a provides, in relevant part, that when a criminal "defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a; see *Buie*, 298 Mich App at 71-72. "The listed offenses include the various forms of criminal sexual conduct." *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007); see MCL 28.722(k), (s), (t), and (w). Our Supreme Court has recognized that MRE 404(b) conflicts with MCL 768.27a, and that MCL 768.27a prevails, but is still subject to MRE 403. *People v Watkins*, 491 Mich 450, 472-476, 481-486; 818 NW2d 296 (2012). This Court has explained the jurisprudence regarding this statute:

> In [*People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007)], this Court held that, "[i]n cases involving the sexual abuse of minors, MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors." The *Pattison* Court concluded that the trial court did not err when it admitted testimony "regarding defendant's alleged sexual abuse of four other minors." *Id.* at 618. However, this Court cautioned "trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence. See MRE 403." *Id.* at 621; see also [*Watkins*, 491 Mich at 481-486] (holding that evidence that is admissible under MCL 768.27a may still be excluded under MRE 403). [*Buie*, 298 Mich App at 71-72.]

However, when considering whether other-acts evidence should be excluded under MRE 403, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference[.]" *Buie*, 298 Mich App at 72 (quotation marks and citation omitted). Our courts have identified "several considerations that may lead a court to exclude such evidence":

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for

> evidence beyond the complainant's and the defendant's testimony. [*Id.* at 72 (quotation marks and citation omitted).]

The prosecution filed a notice of intent to present other-acts evidence pursuant to MRE 404(b) and MCL 768.27a. At the motion hearing, the prosecution specifically indicated two purposes for seeking admission of MRE 404(b) evidence: (1) to show intent, and (2) to establish "defendant's common scheme or plan of sexually assaulting, sexually molesting vulnerable victims, victims [over] which he has a position of authority, whether it be in his youth home, as probationers at his farm, employees of his farm . . . ." Regarding the MCL 768.27a evidence, the prosecution argued that this evidence could "come in for any purpose that is relevant . . . to this case, not just to establish a common scheme or plan under 404(b) . . . ." The trial court permitted one other-acts witness to testify pursuant to MRE 404(b) and two other-acts witnesses to testify pursuant to MCL 768.27a.

The trial court permitted NT to testify pursuant to MRE 404(b), stating in part, "This was a senior in high school and he was on probation, working for the defendant. The defendant obviously could have had an effect on his probation term." The trial court denied admission of testimony of other potential other-acts witnesses because their allegations did not fit within the scheme or plan or were not sufficiently similar, preventing the testimony from being more probative than prejudicial. Pursuant to MCL 768.27a, the trial court permitted other-acts testimony from HC and DV, stating, "It could be argued that [defendant] was an authority figure over the younger cousin and it looks like uncle of [DV].[2] I don't find it sufficiently prejudicial to overcome the statute. . . . So based upon the statute and the recent case of *Watkins* cited by the prosecution, I do find that those two will be admitted—relevant and admitted in this particular matter."

Defendant first argues that the testimony of DV and HC was offered by the prosecution for an improper purpose because while the prosecution offered this evidence to demonstrate intent, intent was not at issue in the case, and the testimony was irrelevant. First, this evidence was admitted pursuant to MCL 768.27a. Because defendant was charged with criminal sexual behavior against three minor foster children: BH, BD, and RR, evidence of defendant's criminal sexual behavior toward DV and HC was presented for a proper purpose pursuant to MCL 768.27a. *Buie*, 298 Mich App at 71-72.

Defendant next argues that the trial court erred in admitting the testimony of all the other-acts witnesses because the trial court failed to balance the prejudicial effect against the probative value, and the probative value was substantially outweighed by the prejudicial effect.

Regarding the testimony of NT, he indicated that at age 18 he was working for Earth Services, both to fulfill his community service requirement for probation and as a paid employee, and defendant was his supervisor. NT testified that defendant told him about how defendant and his friends in college would masturbate together, asked if NT had ever done that, and told NT he wanted to do that with him. NT first thought defendant was joking, but realized it was not a joke

[2] Defendant's aunt, not his sister, was DV's foster mother.

given defendant's persistence. NT used defendant's vehicle to get back and forth to see his probation officer, but defendant told him that if he wanted to continue using his vehicle, he would have to watch defendant masturbate and masturbate with him. Defendant also offered to sell NT a vehicle for half price if he would masturbate with him inside the barn.

Similarly, all of the complainants of the charged offenses were either probationers working for Earth Services or foster children residing at the House Next Door foster group home, and defendant was an authority figure over both sets of individuals. Also, the incidents involving BH, RR, and TK share similar features with the propositions described by DV. BH testified that on May 5, 2011, defendant made a deal with BH that if he showed defendant his penis, defendant would give BH a box of cigars. BH showed defendant his penis, and defendant put BH's penis in his mouth. After about 15 seconds, BH was able to pull his pants up, and defendant began to masturbate. A few days later, BH got into an altercation with another resident, and BH thought he was going to go to jail because he was on probation. Defendant told BH to go to an empty house on the property so defendant could talk to the police and that he would meet BH there later. Once at the house together, defendant pulled down BH's pants and tried to put BH's penis in his mouth. BH pushed defendant away, and defendant began to masturbate. RR testified regarding incidents of mutual masturbation and oral sex between himself and defendant. Finally, TK testified that defendant took him to see a house that defendant was going to let him live in if he was hired by Earth Services, and defendant told TK several times if TK gave him oral sex, TK could live in the house and asked TK if he could touch his penis. TK declined the offer. TK also testified that defendant slapped his butt.

NT's testimony regarding defendant's propositions is sufficiently similar to the acts BH, RR, and TK described because they share common features: (1) defendant's use of his authority position, (2) masturbation involving the victim and/or defendant, and (3) bribery for sexual favors. Thus, there was a "concurrence of common features" that demonstrate these acts were "the individual manifestations" of defendant's plan to use his position of authority, either as a foster parent or supervisor over probationers, to engage in inappropriate sexual acts against minors and young adults. *King*, 297 Mich App at 476-477. The trial court expressly stated that it found NT's testimony to be more probative than prejudicial. In light of the strong similarities between NT's testimony and that of some of the complainants of the charged offenses, we agree with the trial court that the probative value of this evidence outweighed any prejudicial effect, and the trial court did not abuse its discretion in admitting this evidence.

Regarding the testimony of DV and HC, both indicated that defendant sexually abused them. HC testified that she and her mother lived with defendant's family for part of her childhood, and defendant was like a brother to her. However, HC testified that when she was 12 and defendant was 17, she went to defendant's house, where she would spend a lot of time working with and riding horses, and defendant came up behind her when she was in the garage taking care of the horses and put his hands down her shirt and down her pants, touching her breasts and labia. Later that day, inside the house, defendant called HC upstairs, and when HC came up the stairs, defendant was masturbating. DV testified that he was in foster care and was

placed with defendant's sister,[3] and defendant would visit the home and help out with their farm. DV testified that on two occasions when DV was 10 years old, defendant anally penetrated him when he was in the barn on the property.

MCL 768.27a allows the trial court to "weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Buie*, 298 Mich App at 72 (quotation marks and citation omitted). While there are some differences, the similarities between the victims and the acts involved are sufficiently probative to overcome any prejudice. Because HC testified that defendant masturbated during her encounter with him and because defendant was the older cousin of HC and she looked to defendant as a brother figure, HC's encounter involved a similar feature of abuse of authority and similar sexual acts seen in the charged offenses involving the three minors. Likewise, the fact that DV was a foster child makes his abuse strikingly similar to the charged offenses involving the three foster children placed at the House Next Door group home and demonstrates defendant's selection of a certain kind of victim. Therefore, the testimony of HC and DV was probative "to demonstrate the likelihood of defendant's criminal sexual behavior toward other minors." *Buie*, 298 Mich App at 71 (quotation marks and citation omitted). The differences between the uncharged conduct and the charged conduct do not overshadow the similarities. See *Pattison*, 276 Mich App at 615-617. The trial court specifically concluded that the evidence regarding HC and DV was "not sufficiently prejudicial to overcome the statute." Given the highly probative nature of this evidence, the trial court did not abuse its discretion in admitting this evidence.

Our holding is further supported by the fact that the trial court gave a limiting instruction regarding the other-acts testimony). "It is well established that jurors are presumed to follow their instructions." *People v Waclawski*, 286 Mich App 634, 674; 780 NW2d 321 (2009) (quotation marks and citation omitted). This Court has recognized that limiting instructions "can help to alleviate any danger of unfair prejudice . . . ." *Roscoe*, slip op at 5.

Finally, defendant argues that admission of the other-acts evidence denied him his due process rights under the Fourteenth Amendment. Because we have concluded that the trial court did not err in (1) admitting the testimony of DV and HC pursuant to MCL 768.27a, (2) admitting the testimony of NT pursuant to MRE 404(b), and (3) its evaluation of this evidence pursuant to MRE 403, there was no due process violation. *Roscoe*, slip op at 6.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel's failure to move to sever the counts against defendant involving different victims denied him effective assistance of counsel and the right to a fair trial. Ineffective assistance of counsel claims are "mixed question[s] of fact and constitutional law," and we review "findings of fact for clear error and questions of law de novo." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citation omitted). However, our review of defendant's ineffective assistance of counsel claim is

[3] Defendant's aunt, not his sister, was DV's foster mother.

"limited to mistakes apparent from the record" because defendant failed to raise this issue in a motion for new trial or a motion to remand for a *Ginther*[4] hearing. *Id.*

Pursuant to the constitutions of Michigan and the United States, criminal defendants have "the fundamental right to effective assistance of counsel." *Heft*, 299 Mich App at 80, citing US Const, Am VI; Const 1963, art 1, § 20. The defendants bear the burden to prove ineffective assistance, and to do so, "the defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Id.* at 80-81, citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "To show that defense counsel's performance was objectively unreasonable, the defendant must overcome the strong presumption that defense counsel's decisions constituted sound trial strategy." *Id.* at 83. This Court will neither employ the benefit of hindsight, nor "substitute its judgment for that of defense counsel." *Id.* To prove prejudice, the defendant must show that "but for defense counsel's errors, the result of the proceeding would have been different." *Id.* at 81.

MCR 6.120 governs joinder and severance of counts against a single defendant, providing, in relevant part:

> (B) . . . . [T]he court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, *when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.*
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) *a series of acts constituting parts of a single scheme or plan.*
>
> [Emphasis added.]

However, "[o]n the defendant's motion, the court *must* sever for separate trials offenses that are not related as defined in subrule (B)(1)." MCR 6.120(C) (emphasis added).

The prosecution correctly asserts that defendant relies on outdated caselaw, *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977), which has been superseded by MCR 6.120, as recognized by *People v Williams*, 483 Mich 226, 238; 769 NW2d 605 (2009) ("[C]ourts should

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

no longer view *Tobey* as dispositive on issues of joinder and severance."). In *Williams*, our Supreme Court held that the charged offenses were related pursuant to MCR 6.120(B)(2),[5] and the Court's analysis illustrates the rule:

> In both cases, defendant was engaged in a scheme to break down cocaine and package it for distribution. Evidence of acts constituting part of defendant's single scheme was found in both the motel room and the house at 510 Nevada. Even if one views defendant's first arrest in November and his second arrest in February as discrete moments in time, direct evidence indicated that he was engaging in the same particular conduct on those dates. The charges stemming from both arrests were not "related" simply because they were "of the same or similar character." Instead, the offenses charged were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution. [*Williams*, 483 Mich at 234-235 (footnotes omitted).]

The Court explained that whether the evidence would have been admissible in other trials "is an important consideration because joinder of other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial." *Id.* at 237 (quotation marks and citation omitted).

Regarding the charges involving minors BH, BD, and RR, we note these charged offenses were all related because these minors were all foster children who lived at the House Next Door group home run by defendant. Moreover, as discussed above, when a criminal defendant is accused of committing a listed offense against a minor, which includes the various forms of CSC, evidence that the defendant committed another CSC offense against a minor is admissible for consideration on *any* matter to which it is relevant. MCL 768.27a; *Buie*, 298 Mich App at 71-72; *Dobek*, 274 Mich App at 88 n 16. Therefore, evidence regarding the accusations of BH, BD, and RR would have been admissible under MCL 768.27a in each trial involving these three minors, and given the high probative value of this evidence, it is unlikely that a trial court would have excluded the evidence pursuant to MRE 403.

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[5] The *Williams* Court relied on the language of MCR 6.120 prior to the amendment that went into effect on January 1, 2006; however, the prior language of MCR 6.120(B) was very similar to the current language and read:

> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan. [*Williams*, 483 Mich at 233.]

Regarding the charges involving CW and TK, while not minors, these offenses were related to the offenses against the minors because the allegations indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to use his position of authority at Earth Services and the House Next Door to engage in inappropriate sexual acts against minors and young adults.[6] This evidence would have been admissible pursuant to MRE 404(b) because it demonstrates a scheme, plan, or system in doing an act, and given the high probative value of the evidence, it is unlikely that the trial court would have excluded it pursuant to MRE 403.

Because the charges were related pursuant to MCR 6.120(B)(1)(c), severance was not required pursuant to MCR 6.120(C), and joinder was appropriate pursuant to MCR 6.120(B)(1)(c). Therefore, had counsel moved for severance, the decision would have been within the trial court's discretion, and the trial court would have considered whether severance was "appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B); *Williams*, 483 Mich at 234 n 6 (explaining that the ultimate ruling of a trial court regarding a motion to sever is reviewed for an abuse of discretion).

Defendant cannot overcome the strong presumption of sound trial strategy to prove deficient counsel performance because defense counsel's theory at trial was that the victims had conspired to make false allegations of criminal sexual conduct against defendant, 42. *Heft*, 299 Mich App at 83. This theory *relied* on the fact that multiple allegations were made. Likewise, defendant also cannot demonstrate a reasonable probability of prejudice because, again, defendant's trial strategy to prove his innocence relied on the jury knowing about all of these accusations. *Id.* at 81. Therefore, defendant cannot demonstrate ineffective assistance of counsel.[7]

C. SCORING OF OFFENSE VARIABLES

Defendant argues that he is entitled to resentencing because the trial court erred in scoring OV 4, OV 9, and OV 19. While defendant did not file a motion for resentencing in the

[6] Defendant seems to be troubled by the fact that the offenses occurred at different times and in different years. However, all the charged offenses occurred within the three-year period that defendant operated the House Next Door—2009 to 2011. Moreover, our Supreme Court quoted with approval caselaw from another jurisdiction that states, "'there is no hard-and-fast rule regarding time limits, and . . . the necessary proximity must vary with the circumstances.'" *Williams*, 483 Mich at 249, quoting *Commonwealth v Gaynor*, 443 Mass 245, 259-260; 820 NE2d 233 (2005).

[7] In defendant's brief on appeal, he requests remand for a *Ginther* hearing "[i]f more information is needed to evaluate ineffectiveness." Pursuant to MCR 7.211(C)(1), defendant was required to move to remand "[w]ithin the time provided for filing the appellant's brief[,]" and to support this motion "by affidavit or offer of proof regarding the facts to be established at a hearing." Because defendant has failed to comply with these requirements, we deny his request for remand.

lower court or a motion for remand in this Court, a sentencing issue can still be preserved by raising the issue at sentencing. MCL 769.34(10).

Our Supreme Court has recently clarified the standards for appellate review of sentencing issues, stating:

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnote omitted).][8]

However, if the defendant fails to raise the issue at sentencing, in a motion for resentencing, or in a motion to remand, it is unpreserved, and we review unpreserved issues regarding sentencing errors "for plain error affecting a defendant's substantial rights." *People v Gibbs*, 299 Mich App 473, 492; 830 NW2d 821 (2013); *People v Kimble*, 470 Mich 305, 309-312; 684 NW2d 669 (2004). Pursuant to MCL 769.34(10), appellate courts must affirm a sentence "if a minimum sentence is within the appropriate guidelines sentencing range . . . absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining the sentence." *Gibbs*, 299 Mich App at 491 (quotation marks and citation omitted). Moreover, if a scoring error does not change the guidelines range, then remand for resentencing is not required. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

1. OV 4

Defendant argues that because the PSIR does not contain any information indicating the victim suffered psychological injury and the record does not include a victim-impact statement, the record is devoid of evidence to support a score of 10 points for OV 4. Because defendant first raised this issue in his brief on appeal, this issue is unpreserved and is reviewed "for plain error affecting a defendant's substantial rights." *Gibbs*, 299 Mich App at 492.

OV 4 pertains to the "psychological injury to a victim" and is scored 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). The statute directs courts to "[s]core 10 points if the serious psychological injury may require professional treatment[,]" but "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). This Court has held that a "victim's statements about feeling angry, hurt, violated, and frightened support" a score of 10 points. *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012).

[8] Defendant incorrectly asserts that "[a] scoring decision for which there is any evidence in the record will be upheld." See *Hardy*, 494 Mich at 438 n 18 ("This statement is incorrect. The 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines.").

Contrary to defendant's arguments on appeal, the record supports the trial court's scoring of 10 points for OV 4. BH testified at trial that defendant made him swear not to disclose the incident involving oral sex and masturbation in the chicken coop on defendant's property, and BH agreed not to tell because he was "scared what [would] happen next if [he] didn't [agree]." BH explained that he was concerned that defendant would be able to pull some strings to get BH put in jail or transferred to "a more secure environment." BH also explained that before he disclosed the incidents to Derek Caldwell, a staff member at the House Next Door, he was "[s]kittish," "nervous," "embarrassed," and "scared that [Caldwell] wouldn't help [him] out and that [Caldwell would] tell [defendant] and then [BH would] go to jail." Caldwell's testimony, regarding defendant's behavior before he disclosed the incidents involving defendant to Caldwell, supports BH's testimony. Caldwell recalled that BH "stepped into the kitchen and chucked a cup off the table after he asked me probably five to six times . . . and me tellin' him to just hold on . . . and then just went runnin' into his room and started bawlin'." Therefore, the trial court did not plainly err by scoring 10 points for OV 4.

2. OV 9

Defendant argues that the trial court improperly scored 10 points for OV 9 because BH was the only individual present when the offenses against him occurred.

OV 9 pertains to the "number of victims." MCL 777.39. OV 9 is to be scored 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(1)(c). The statute instructs courts to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). However, "when scoring OV 9, only people placed in danger of injury or loss of life *when the sentencing offense was committed* (or, at the most, during the same criminal transaction) should be considered." *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008) (emphasis added).

At sentencing, the prosecution requested a score of 10 points for OV 9, and defense counsel objected and requested a score of zero, preserving this issue for appeal. MCL 769.34(10). The trial court concluded that OV 9 should be scored 10 points because "there were convictions on over two victims . . . ." On appeal, the prosecution concedes that OV 9 should have been scored zero points because only those who were in danger of injury or loss of life at the time the offense was committed should be considered victims. We agree.

However, defendant is not entitled to resentencing. Defendant's total PRV score was 20 and total OV score was 70, and the offense being scored, CSC III, is a class B offense; thus, an OV score from 50 to 74 would place defendant in the 51 to 85 month range. MCL 777.16y. Therefore, reducing defendant's total OV score from 70 to 60 points would not alter the 51 to 85 month sentencing range, and this sentencing error does not require resentencing. MCL 777.63; *Francisco*, 474 Mich at 89 n 8.

3. OV 19

Defendant next argues that the trial court erred in scoring 10 points for OV 19 because the evidence did not demonstrate that defendant interfered with the administration of justice.

OV 19 is to be scored 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). While the general rule is that when scoring OVs the trial court must only consider the sentencing offense unless a particular OV provides otherwise, our Supreme Court has held "that because the circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense, scoring OV 19 necessarily is not limited to consideration of the sentencing offense." *People v Smith*, 488 Mich 193, 195, 201-202; 793 NW2d 666 (2010). Thus, the trial court may consider conduct that occurred after completion of the sentencing offense in scoring OV 10. *Id.* at 201-202. Moreover, "the scoring of the guidelines need not be consistent with the jury verdict . . . ." *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds 469 Mich 415 (2003).

This Court has upheld scoring 10 points for OV 19 where a defendant wiped a knife clean, told his companion to dispose of the knife, and asked people to lie about where he was the night of the crime. *People v Ericksen*, 288 Mich App 192, 203-204; 793 NW2d 120 (2010). Moreover, this Court has summarized Michigan jurisprudence on this issue, stating:

> Decisions of both this Court and our Supreme Court have found the following conduct to constitute an interference or attempted interference with the administration of justice: threatening or intimidating a victim or witness, telling a victim or witness not to disclose the defendant's conduct, fleeing from police contrary to an order to freeze, attempting to deceive the police during an investigation, interfering with the efforts of store personnel to prevent a thief from leaving the premises with unpaid store property, and committing perjury in a court proceeding. Each of these acts hampers, hinders, or obstructs the process of administering judgment of individuals or causes by judicial process. For instance, *the acts of witness intimidation and deceiving police investigators seek to prevent incriminating evidence from being used throughout the process of administering judgment of individuals by judicial process, including during both the pretrial and, potentially, trial stages*. [*People v Hershey*, __ Mich App __; __ NW2d __ (Docket No. 309183, issued December 5, 2013) (internal citations omitted), slip op at 7-8 (emphasis added).]

At sentencing, the prosecution requested scoring OV 19 at 10 points, and defense counsel objected and requested a score of zero, preserving this issue for appeal. MCL 769.34(10). The trial court concluded that defendant interfered with the administration of justice and scored 10 points for OV 19 because (1) Kevin Hazelwood, who volunteered at Earth Services as a KREP participant and was subsequently employed at Earth Services, testified that defendant asked him to change his story, (2) Hazelwood testified that defendant directed him to clean a location where alleged acts occurred, (3) an other-acts witness was asked to sign a letter that essentially denied a previous statement the witness made that defendant sexually assaulted her, and (4) through another person, defendant encouraged RR to keep lying if he was lying.

The trial court's reasons for scoring 10 points for OV 19 are supported by the record. First, Hazelwood testified that early in May 2011, he saw defendant and BH inside the chicken coop on defendant's property when he and Michael Caldwell (Michael) arrived at the chicken coop, and Hazelwood could tell that BH was upset. Hazelwood testified that after Hazelwood

talked to police, defendant asked him in person and on the phone to tell a different version of that day to the police. Defendant asked Hazelwood to change his story to indicate that Hazelwood and Michael were already working at the chicken coop when defendant and BH arrived and that defendant left BH with Hazelwood and Michael, which would have made Hazelwood's account inconsistent with BH's allegations.

Second, Hazelwood also testified that after police had searched the chicken coop for evidence, defendant asked Hazelwood to bleach and scrub the basement of "the kennel house" on defendant's property because someone would be moving into the basement. RR testified that he and defendant engaged in sexual acts together in the basement of the kennel house, and semen went onto the floor.

Third, HC, who testified that defendant sexually assaulted her, testified that she signed a letter given to her by defendant's sister because she felt that if she did not, her family would not associate with her like they did roughly 16 years ago when HC reported to police and told her family that defendant had sexually assaulted her. HC responded negatively when asked if she realized she indicated in that letter that defendant never tried to sexually abuse her, explaining that she did not read the letter when she signed it. In response to the jury's question regarding whether she was under family pressure to sign the letter "on the spot" and if that was why she did not read the letter, HC responded affirmatively.

Fourth, Jennifer McLeod, a former supporter of defendant and volunteer at Earth Services, testified that after a conversation with RR, she confronted defendant about the content of her conversation with RR, and defendant said, "[W]ell, if he's sayin' he's lying, then tell him to keep lying, tell him to keep lying. I'm gonna lose my children. I'm gonna lose my home. I'm gonna lose my wife."

Defendant attempts to argue that because the alleged cleaning involved RR, the trial court should not have relied on this evidence given that defendant was acquitted of the charges involving RR. However, because the scoring of sentencing variables does not need to be consistent with the jury verdict, defendant's argument is unavailing. *Perez*, 255 Mich App at 712.

Defendant's only other argument is that "[t]he allegations that Defendant told Hazelwood to change his statement and Hardy not to tell anyone, were insufficient to conclude there was an attempt to interfere with the administration of justice." However, the trial court explicitly stated it was "not considering the fact that [defendant] asked [BH] not to tell anyone . . . ." Moreover, defendant does not explain why defendant telling Hazelwood to change his statement would not constitute interference with the administration of justice; therefore, defendant has failed to "adequately prime the [appellate] pump . . . ." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (quotation marks and citation omitted). Regardless, the trial court's scoring of OV 19 is supported by both the facts and our jurisprudence explicating the meaning of "interference with the administration of justice." *Hershey*, slip op at 7-8; *Ericksen*, 288 Mich App at 204. The trial court did not clearly err in its findings of fact supporting the scoring, and the trial court did not err in finding that these facts were adequate to support the scoring by a preponderance of the evidence. *Hardy*, 494 Mich 438.

D. DEPARTURE FROM GUIDELINES

Defendant argues that he is also entitled to resentencing because the reasons the trial court provided for departing from the sentencing guidelines range were not substantial and compelling because the trial court relied on subjective factors. We review "for clear error whether a particular factor articulated by the trial court exists," and de novo a trial court's finding that a factor for departure is objective and verifiable. *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012). However, a trial court's conclusion that these factors provide substantial and compelling reasons to justify departure from the sentencing guidelines is reviewed for an abuse of discretion. *Hardy*, 494 Mich at 438 n 17; *Anderson*, 298 Mich App at 184. "The trial court abuses its discretion when its result lies outside the range of principled outcomes." *Anderson*, 298 Mich App at 184.

Pursuant to MCL 769.34(3), a trial court "may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." "The reasons for a particular departure must be objective and verifiable." *People v Malinowski*, 301 Mich App 182, 186; 835 NW2d 468 (2013). "Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision, and are capable of being confirmed." *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004). Moreover, "[a] trial court's reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record." *Anderson*, 298 Mich App at 185. However, trial courts must provide justification for not just the fact of departure, but "for the *particular* departure made." *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008). The trial court also must explain why its departure sentence is more proportionate than a sentence within the guidelines range would have been. *Id.* at 304. Substantial and compelling reasons for departure "exist only in exceptional cases," should be of "considerable worth in deciding the length of a sentence," and should "keenly or irresistibly grab our attention . . . ." *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003) (quotation marks and citations omitted). If this Court determines that some of the reasons articulated by the trial court are not substantial and compelling and that others are, we "must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone." *Babcock*, 469 Mich at 260.

At sentencing the trial court discussed two offense variables—OV 10 and OV 13—in stating its reasons for departure, explaining that the scores for these OVs were not adequate in light of the circumstances, such that an upward departure was appropriate. Finally, the court added, "Additionally, to make the record clear for the [C]ourt of [A]ppeals, this Court does find that the sentence imposed is proportionate to the crime with which the Defendant was convicted by jury trial."

Defendant first argues that the trial court placed too much emphasis on the predatory conduct of defendant, and the trial court engaged in an inappropriate subjective analysis when it concluded that defendant "groomed some of these children." However, defendant takes this

comment out of context. The trial court discussed OV 10, MCL 777.40 (exploitation of vulnerable victim), concluding that 15 points for predatory conduct was not adequate (S, pp 38-39).[9] The trial court stated in part:

> I don't feel that that offense variable accurately or adequately takes into account the magnitude of the authority status that you had over these children. You ran a foster youth home. You were entrusted by the State of Michigan to take care of those children, and those were children that had been previously traumatized, previously sexually abused. According to the testimony, you asked for abused, sexually abused children. You asked for the worst of the worst. You re-traumatized kids that already had been traumatized, and your attorney has stated, and this is true borne out from some of the evidence and some of the things that I know from motions and things that have been presented in court, regardless of whether or not they were presented to the jury, that those children had serious issues, serious mental health issues, serious anger issues which wouldn't be unusual considering the types of environment[s] that those children were brought up in. As stated by Miss Povilaitis, they have been in that environment since they were very young children. Moved around from place to place.
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> * * *
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> And I do believe there was predatory conduct in . . . the way that you groomed some of these children, according to the testimony. . . . There was sexual talk, there was non-sexual behavior or what the children thought was non-sexual behavior, prior to anything happening.

The fact that defendant (1) ran a foster youth home, (2) requested children who were sexually abused, (3) revictimized children that had previously been abused and traumatized, and (4) engaged in sexual talk with the youths in the home are all objective and verifiable reasons for the departure based upon testimony presented at trial. *Anderson*, 298 Mich App at 185.

It is undisputed that defendant ran the House Next Door group home for youth foster children. Regarding defendant requesting sexually abused children, Debra Ingle, a foster care license worker, testified that defendant specifically indicated a preference for boys aged 13 to 18 and indicated that he felt comfortable working with "bed wetters, runners, and sexually active boys." Ingle also testified that defendant expressed an interest in "developmentally delayed, anger management issues, attachment disorders, (male) sib sets, . . . probation, bedwetters, sexually abused, respite or full time, runaways, emotional issues . . . ." Defendant also stated to Ingle, "The harder to place the better." Ingle's testimony indicated that defendant requested specific children he had looked up in a directory of foster children, which provided information about children including any known sexual behavior, and the children defendant requested had sexual issues and were sexually active.

[9] Predatory conduct is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

Regarding revictimizing previously abused children, traumatized children, and children with serious issues, Danielle Denney, who worked directly with the foster children at the House Next Door, testified that the House Next Door housed residents who mostly "tended to be troubled teens with psychiatric histories or troubled histories with the law, in foster care that didn't work in normal foster settings." More specifically, BD, who testified that defendant would rub his leg within two to three inches of his genitals when he was upset, which made him "feel uncomfortable," indicated that he tried to suppress the memories of the incidents involving defendant because BD was molested by an uncle when he was three. Also, BH testified that in a previous foster placement, he "would get abused by the older children in the house."

Regarding engaging in sexual talk, TK testified that on one occasion, he and other probationers working at Earth Services and defendant were making "sod/gay jokes," and "then [defendant] took it too far" when he grabbed CW's genital area. BH also testified that he and another foster youth were joking about who had a larger penis, and after the other youth left, defendant asked to see BH's penis, but BH thought he was just joking at the time. Therefore, the trial court relied on objective and verifiable factors that are supported by the record to support its upward departure.

Defendant next argues that the trial court inappropriately made subjective assessments in concluding (1) that defendant's long-standing pattern indicated that he was a danger to the community and (2) that defendant's lack of remorse demonstrated his inability to appreciate the impact of his actions on the victims. While "a trial court's 'belief' that a defendant is a danger to himself and others is not in itself an objective and verifiable reason, objective and verifiable factors underlying this belief—such as repeated offenses and failures at rehabilitation—constitute an acceptable justification for an upward departure." *People v Horn*, 279 Mich App 31, 44; 755 NW2d 212 (2008) (internal citation omitted). Additionally, this Court has "affirmed the trial court's upward departure from the guidelines range on the basis of the defendant's propensity to commit future sex crimes against children." *Id.* at 45. However, whether a defendant has expressed remorse is a subjective factor that this Court cannot review. *People v Daniel*, 462 Mich 1, 8 n 9, 11; 609 NW2d 557 (2000); *People v Fields*, 448 Mich 58, 69, 80; 528 NW2d 176 (1995).

Regarding OV 13, the trial court noted that OV 13 only goes back to a five-year period, but there were "other-acts victims": a 12 year-old victim that alleged sexual assault and a 10 year-old victim "that was in the foster care system with [defendant's] mother[10] that [defendant] raped, according to the testimony presented here at trial." The trial court went on, stating:

> This pattern continued on for many years, continued on with you, in my opinion, requesting children who were sexually abused, putting them in your care and then abusing them again. And I am looking at that pattern in considering whether or not you're a danger to the community. That long-standing pattern would suggest that you are in fact a danger to the community, coupled with the fact that I have read your letter. You don't express any remorse for the victims. All you talk

[10] Defendant's aunt, not his mother, was DV's foster mother.

> about is yourself and what you're going to do. I don't think you have an appreciation for the . . . consequences of your actions or the damage that was done to the victims.

While the trial court's opinion that defendant is a danger to the community is not itself objective and verifiable, the facts the trial court relied on to reach his conclusion are objective and can be verified, namely defendant's history of sexual abuse of children. See *Horn*, 279 Mich App at 44-45. Two other acts witnesses, HC and DV, testified regarding instances of sexual abuse by defendant more than 12 years ago. Additionally, defendant's PSIR indicated that before the instant case, several police reports were made regarding behavior of defendant that was very similar to defendant's behavior in the present case and also involved individuals in his charge. Therefore, the trial court's conclusion that defendant was a danger to society was supported by objective and verifiable facts. *Anderson*, 298 Mich App at 185.

However, the trial court did abuse its discretion by relying on its subjective assessment that defendant did not "express any remorse for the victims" or appreciate the "consequences of [his] actions or the damage that was done to the victims." *Daniel*, 462 Mich at 8 n 9, 11; *Fields*, 448 Mich at 69, 80. Nonetheless, in light of the other valid reasons articulated by the trial court, and the lengthy explanation for this particular sentence, we determine that the trial court "would have departed to the same degree on the basis" of the remaining substantial and compelling reasons alone. *Babcock*, 469 Mich at 260.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray